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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WATSO,

Defendant and Appellant.

F055327

(Super. Ct. No. BF116252A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Peggy A. Headley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Tia M. Coronado, Deputy Attorneys General, for Plaintiff and Respondent.

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Outside the house where he lived in Bakersfield, Michael Patrick Watso stabbed his sister, Christina Maria Watso, in the abdomen with a knife on September 22, 2006.[1] The court found him competent to stand trial. A jury found him guilty of attempted willful, deliberate, and premeditated murder with personal infliction of great bodily injury and with personal use of a deadly weapon, found him guilty of assault with a deadly weapon with personal infliction of great bodily injury, and found him sane at the time of the commission of both crimes.

On appeal, Michael challenges on due process grounds the sufficiency of the evidence of mental competence and of deliberation and premeditation, the court's delay in compliance with the jury's request for written instructions, and the court's conduct of the mental competence proceedings. We affirm the judgment.

FACTUAL BACKGROUND

After living for 20 years with his girlfriend, who died suddenly, Michael asked Christina to move from North Carolina to help him cope. She thought the house was his, so she moved in with him and, for a couple of months, cleaned the house, took him to the doctor, and otherwise cared for him.

Later, the owner of the funeral home that handled the girlfriend's funeral told Christina that she had to leave since she was living there illegally. She asked Michael about that, but he told her to shut up and to leave the house because she was meddling in his business. With nowhere else to stay, she moved into the funeral home owner's house.

To pay back the funeral home owner for letting her stay at his house, Christina agreed to help get the house where Michael was still living ready for sale and to help get him out of the house. As she cleaned the house one day, Michael threatened her, grabbed a knife, and pursued her outside, where he tackled her, stabbed her in the abdomen, and,

[1] For brevity, not from disrespect, later references to the siblings are by first names only.

as she lay bleeding on the ground, stepped on her wrist and said, "You can consider this Helter Skelter," "I know you're dying," and "Just remember I'm going after the rest of your family."

PROCEDURAL BACKGROUND

On September 26, 2006, the district attorney filed a complaint charging Michael with attempted willful, deliberate, and premeditated murder with personal infliction of great bodily injury and with assault with a deadly weapon (knife) with personal infliction of great bodily injury. (Pen. Code, §§ 187, subd. (a), 189, 245, subd. (a), 664, 12022.7, subd. (a).)[2]

On April 10, 2007, the district attorney filed an information charging Michael with attempted willful, deliberate, and premeditated murder with personal infliction of great bodily injury and personal use of a deadly weapon (knife) and with assault with a deadly weapon (knife) with personal infliction of great bodily injury. (§§ 187, subd. (a), 189, 245, subd. (a), 664, 12022, subd. (b)(1), 12022.7, subd. (a).)

On April 16, 2007, Michael pled not guilty to both charges and denied the allegations. On July 27, 2007, he entered an additional plea of not guilty by reason of insanity to both charges, and the court appointed two psychiatrists. (§ 1027.)

On March 13, 2008, the eighth day of the guilt phase of trial, a jury found Michael guilty as charged. On March 19, 2008, the third day of the sanity phase of trial, a jury found him sane at the time of the commission of both crimes.

On April 22, 2008, the court imposed a sentence of life with possibility of parole for attempted willful, deliberate, and premeditated murder and a consecutive three-year enhancement for personal infliction of great bodily injury and a consecutive one-year enhancement for personal use of a deadly weapon and imposed and stayed a term of four years (aggravated term) for assault with a deadly weapon and a consecutive three-year

[2] Later statutory references are to the Penal Code except where otherwise noted.

enhancement for personal infliction of great bodily injury. (§§ 187, subd. (a), 189, 245, subd. (a), 654, 664, 12022, subd. (b)(1), 12022.7, subd. (a).)

DISCUSSION

1. Sufficiency of the Evidence of Mental Competence

Michael argues that an insufficiency of the evidence of his "ability to assist counsel in the conduct of the defense in a rational manner" denied him due process. The Attorney General argues the contrary.

On March 26, 2007, each of the three psychologists whom the court appointed to evaluate Michael for mental competence – Laura Hamon, Michael Musacco, and Ross Kremsdorf – testified at his mental competency hearing after submitting reports on the basis of, inter alia, interviews with him. (§ 1368.) Hamon and Musacco opined he was mentally competent. Kremsdorf opined he was mentally incompetent. On appeal, Michael challenges Hamon's and Musacco's opinions.

Preliminarily, we address Michael's contention that the record consists solely of the *testimony* of the psychologists since the court never admitted their *reports* into evidence *at the hearing*. He relies on *People v. Thuss* (2003) 107 Cal.App.4th 221, which held that where counsel *never* marked for identification or offered in evidence, and the court *never* received in evidence, documents the defendant put at issue on appeal there was no ruling to review. (*Id.* at pp. 230-233.) Here, both parties through counsel and Michael personally entered into a stipulation *before the hearing* that the reports by the psychologists whom the court had appointed "be received in evidence." *Thuss* is inapposite. The stipulation entered in evidence the psychological reports now in the record on appeal.

Construing his argument to include Hamon's and Musacco's testimony *and* their reports, we turn to Michael's core argument that the testimony of those two psychologists constitutes an insufficiency of the evidence of his ability to assist counsel in the conduct

of the defense in a rational manner. A defendant is mentally incompetent, of course, if he or she is "unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).)

On the basis of the administration of two standardized assessments that are generally accepted in the scientific community as reliable methods for assessing mental competence, Hamon opined that Michael understood courtroom procedures, including the respective roles of his attorney, the district attorney, and the judge, and had a knowledge of plea bargaining, an understanding of the reasons for his arrest and incarceration, and an awareness of his upcoming court date. She opined that by saying he wanted "to get to go home" he "demonstrated the ability to advocate for himself" and that by saying his attorney "only talked to me for three minutes" and was not "even in court with me" he accurately summarized a portion of his own court proceedings. She ascribed to cynicism his failure to pass some assessments and his replies to questions about what his sentence might be ("death") and where he might serve his sentence ("hell") and inferred from the rest of his interview that "he very much understood legal proceedings."

On the basis of, inter alia, a clinical interview, a mental status examination, and a competency test, Musacco, the last psychologist to evaluate Michael, diagnosed him as a mentally ill malingerer who was competent to stand trial. He characterized his statements "that he could not identify the current date, month, or year, or the current President of the United States" and "that there are 'six days' in one week and 'six months' in one year" as "exaggerating his deficits and minimizing his abilities." He inferred from Michael's narrative that "one said … I was okay, the other one said … I was incompetent, and I'm incompetent" that "he had an agenda" and that "he wanted to be found incompetent." He "upped the ante," Musacco opined, so "his behaviors became more absurd and less believable" as he was "trying to obtain a specific goal to be found incompetent." Michael's malingering precluded Musacco from obtaining "valid data" to support a finding of mental incompetence.

Michael argues that Hamon's opinions, inter alia, that he cooperated during his interview with her (which is "fundamentally different from [his] ability to assist the defense in a rational manner") and that he may cooperate with another attorney in the future (which is "speculation and guesswork") show an insufficiency of the evidence. He argues, too, that Musacco's opinions, inter alia, that he "was malingering" even though he "passed the objective test for malingering" and that he was "competent" even though he "failed the test for competency" likewise show an insufficiency of the evidence. "It shall be presumed that the defendant is mentally competent," however, "unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." (§ 1369, subd. (f).) A finding of competence to stand trial cannot be disturbed on appeal "'if there is any substantial and credible evidence in the record to support the finding.'" (*People v. Hightower* (1996) 41 Cal.App.4th 1108, 1111.)

That is the state of the record here. Michael's selective dissection of some of Hamon's and Musacco's opinions is but a roundabout request that we reweigh the facts. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-333 (*Bolin*).) That we cannot do. By the applicable standard of review, a sufficiency of the evidence is in the record of Michael's ability to assist counsel in the conduct of the defense in a rational manner.

2. Sufficiency of the Evidence of Deliberation and Premeditation

Michael argues that an insufficiency of the evidence of deliberation and premeditation denied him due process. The Attorney General argues the contrary.

The crux of Michael's argument is the premise that he "reasonably believed" that his sister, who was staying at the funeral home owner's house and doing chores for him, "was part of a conspiracy to oust him from his home" and to "steal from him." On that premise, he argues that the evidence shows not a deliberated and premeditated attempted murder but a "rash unconsidered decision" to stab her *once*.

The key case for analysis of the sufficiency of the evidence of deliberation and premeditation, the parties agree, is *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), a murder case. The courts use the "tripartite test" in *Anderson* to analyze three basic types of evidence – ""(1) planning activity; (2) motive (established by a prior relationship and/or conduct with the victim); and (3) manner of [attempted] killing" – to determine "whether the evidence is sufficient to support a finding of premeditation and deliberation."[3] (*People v. Sanchez* (1995) 12 Cal.4th 1, 32, overruled on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) While serving "'as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the [attempted] killing resulted from preexisting reflection and weighing of considerations,'" the tripartite test "'did not refashion the elements of first degree murder or alter the substantive law of murder in any way.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019, quoting *People v. Thomas* (1992) 2 Cal.4th 489, 517.)

Applying the tripartite test, the courts analyze evidence of (1) planning activity with reference to "facts about how and what defendant did *prior* to the actual [attempted] killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, [a] killing." (*Anderson, supra,* 70 Cal.2d at pp. 26-27.) The courts analyze evidence of (2) motive with reference to "facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the [attempted] killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed.'" (*Id.* at p. 27.)

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[3] Since the crime here is attempted murder, not murder, we refer to the third type of evidence as "manner of attempted killing," not "manner of killing."

The courts analyze evidence of (3) manner of [attempted] killing with reference to facts "from which the jury could infer that the *manner* of [attempted] killing was so particular and exacting that the defendant must have intentionally [attempted to] kill[] according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Anderson, supra,* 70 Cal.2d at p. 27.) Our Supreme Court finds a sufficiency of the evidence of deliberation and premeditation typically "when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Ibid.*)

Our review of the record discloses evidence of all three types. A reasonable jury could infer (1) planning activity from Michael's statement that he was going to stab Christina if she did not get out of the house and from the act of his arming himself with a knife before stabbing her. A reasonable jury could infer (2) motive from his having told her to leave the house because she was meddling in his business and from her having agreed to help get the house where he was still living ready for sale and to help get him out of the house. A reasonable jury could infer (3) manner of attempted killing from his having twisted the knife after thrusting the weapon into her abdomen, lacerating her liver badly enough to warrant suturing during emergency surgery, and from his having told her, after stepping on her wrist as she lay bleeding on the ground, "You can consider this Helter Skelter," "I know you're dying," and "Just remember I'm going after the rest of your family."

Our duty on a challenge to the sufficiency of the evidence is to review the whole record in the light most favorable to the judgment for substantial evidence – credible and reasonable evidence of solid value – that could have enabled any rational trier of fact to have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Prince* (2007) 40 Cal.4th 1179, 1251 (*Prince*).) In doing so, we presume in support of the judgment the existence of every fact a reasonable trier of

fact could reasonably deduce from the evidence. (*Prince, supra,* at p. 1251.) The same standard of review applies to circumstantial evidence and direct evidence alike. (*Ibid.*)

Before a reviewing court can reverse the judgment for insufficiency of the evidence, "it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) That is not the state of the record here. Again, Michael's insufficiency of the evidence argument simply asks us to reweigh the facts. (*Bolin, supra,* 18 Cal.4th at pp. 331-333.) That we cannot do.

3. Compliance with Request for Written Instructions

Michael argues that the court's delay in compliance with the jury's request for written instructions denied him due process. The Attorney General argues the contrary.

At 9:00 a.m. on March 13, 2008, the court instructed the jury, "Members of the jury, I will now instruct you on the law that applies to this case and, if you so request, I will give you a copy of the instructions to use in the jury room." After instructing the jury, the court invited the parties to stipulate that "in the event that the jury asks for jury instructions or the exhibits be brought back into the jury room, our clerk can forthwith give those items to our bailiff to take back into the jury room without prior notification of counsel." The parties so stipulated. At 10:18 a.m., the jury retired to begin deliberations.

Moments later, after noting for the record the jury had begun deliberations and the alternate juror had stepped out, the court addressed an issue that Michael's attorney had raised about a possible instructional ambiguity where "intoxication is not a defense to assault with a deadly weapon or simple assault." At 10:30 a.m., when the court and counsel began discussing a proposed clarifying instruction, the jury sent the court a note requesting "a copy of the jury instructions" along with some exhibits. At 10:34 a.m., the court recessed for additional research on the intoxication instruction issue, resuming the

dialogue with counsel at 11:28 a.m. Shortly before noon (the record shows 11:50 a.m. *and* 11:55 a.m.), the jury recessed for lunch.

At 1:30 p.m., the jury resumed deliberations. At 1:32 p.m., the court and counsel agreed to change the wording of certain instructions from "killing" to "attempted killing" and of another instruction to reflect the absence of any comment by the court on the evidence and settled on the text of a clarifying intoxication instruction. At 3:02 p.m., when the jury returned to the courtroom, the court apologized for the delay, confirmed the jury's receipt of the requested exhibits, read the clarifying intoxication instruction, and handed all of the written instructions to the bailiff for delivery to the jury. At 3:09 p.m., the jury retired for additional deliberations. At 3:42 p.m., the jury sent the court a note reading, "We, the jury, have reached a verdict on all counts."

Michael disingenuously argues that the court took "nearly five hours" to comply with the jury's request for the written instructions, but he includes in that figure the time the jury spent, first, eating lunch and, second, sitting in the courtroom as the court read the clarifying intoxication instruction and handed all of the written instructions to the bailiff for delivery to the jury. From the time of the jury's request for, to the time of the jury's receipt of, the written instructions, the jury deliberated for fewer than three hours. After receipt of all of the written instructions, the jury deliberated for another 33 minutes before returning verdicts.

For his argument that the court erred, Michael's primary authority is section 1093, subdivision (f), which reads, in relevant part, "The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy." Conspicuously absent from the statute is any time limit within which the court is required to comply with the jury's request for the written instructions. Even so, Michael argues that "it is inconceivable the jury made an informed decision and faithfully applied the law." Yet none of his other authorities supports his argument, either.

Prominent among those authorities are *People v. Blakley* (1992) 6 Cal.App.4th 1019 (*Blakley*) and *People v. Santamaria* (1991) 229 Cal.App.3d 269 (*Santamaria*). In *Blakley,* the court "specifically told the jury that the written instructions would not be made available, but if they wanted the instructions they could be brought back and have them recited or reread." (*Blakley, supra,* at pp. 1022-1023.) The court's flouting of the explicit statutory mandate "was clearly and unquestionably error," though not reversible error. (*Id.* at p. 1023.) Here, on the other hand, the statute does not expressly proscribe delay in compliance with the jury's request for the written instructions. *Blakley* is inapposite.

In *Santamaria,* the court "adjourned jury deliberations for 11 days without good cause, despite both the availability of an alternative to interrupting the deliberations and the prejudice to appellant inherent in the timing and duration of the adjournment." (*Santamaria, supra,* 229 Cal.App.3d at p. 272.) At issue in *Santamaria* was section 1121, which "provides in relevant part: 'The jurors … may, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. Where the jurors are permitted to separate, the court shall properly admonish them ….'" (*Id.* at p. 276, fn. 4.) On a record with "no administrative duties, congested calendar, or any other exceptional circumstances to explain the continuance," the reviewing court reversed, characterizing the "inordinate interruption" as an abuse of discretion and "the timing and duration of the continuance" as "particularly troublesome" and observing that a "long adjournment of deliberations risks prejudice to the defendant both from the possibility that jurors might discuss the case with outsiders at this critical point in the proceedings, and from the possibility that their recollections of the evidence, the arguments, and the court's instructions may become dulled or confused." (*Id.* at pp. 277-279.)

In *Santamaria,* the delay was 11 days long. Here, the delay was not even three hours long. In *Santamaria,* there were no exceptional circumstances to explain the delay. Here, defense counsel drew to the court's attention a possible ambiguity in the

intoxication instruction, which initiated dialogue and research that led to a clarifying instruction the court read to the jury moments before supplying the jury with all of the written instructions. *Santamaria* is inapposite. Michael fails to show that the court's delay in compliance with section 1093, subdivision (f) constituted an abuse of discretion.

Finally, we turn to Michael's due process argument. "'There is no constitutional right to have a physical copy of the jury instructions with the jury during deliberations.'" (*People v. Seaton* (2001) 26 Cal.4th 598, 674, quoting *Blakley, supra,* 6 Cal.App.4th at p. 1023.) We reject his due process argument out of hand.

4. Conduct of Mental Competence Proceedings

Michael argues that the court's conduct of the mental competence proceedings denied him due process. The Attorney General argues the contrary. To address each of Michael's six specific due process challenges in chronological order, we turn to the record.

On October 5, 2006, the court granted the defense motion for an inquiry into Michael's mental competence, ordered Kremsdorf's appointment, and suspended criminal proceedings. (§ 1368.) On November 15, 2006, the court considered Kremsdorf's report and, on its own motion, ordered Hamon's appointment. (§ 1368.) Michael raises two challenges to the latter proceedings. First, he argues that the court's order appointing Hamon after Kremsdorf's appointment was error. Second, he argues that the court committed an abuse of discretion by not ordering the continuance his attorney requested and by appointing Hamon without a prosecution request to do so.

With reference to his first argument, Michael relies on "plain language" that he excerpts from section 1369, subdivision (a): "The court shall appoint *a* psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. In any case where the defendant or the defendant's counsel informs the court that the defendant is *not* seeking a finding of mental incompetence, the court shall

appoint *two* psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution." (Italics added.) Since the statute *requires* the appointment of two psychologists if the defendant is *not* seeking a finding of mental incompetence, he argues by inference that the statute *prohibits* the appointment of two psychologists if the defendant *is* seeking a finding of mental incompetence. Contrary to his argument, the inference he draws is nowhere in the "plain language" of the statute. None of the cases on which he relies so holds, either. His argument without citation to relevant authority is not persuasive. (See *People v. Williams* (1997) 16 Cal.4th 153, 266 (*Williams*).)

Michael's second argument – that the court committed an abuse of discretion by not ordering the continuance his attorney requested and by appointing Hamon without a prosecution request to do so – has two components. The crux of the first component is that the court "improperly failed to rule on the request for a continuance." The record belies his claim. The reporter's transcript shows not only that the deputy district attorney making a special appearance on that day represented that the deputy district attorney assigned to the case had not seen a copy of Kremsdorf's report but also that the deputy public defender making a special appearance on that day represented that the deputy public defender assigned to the case "would ask to set it over so he could physically get a report and discuss it with his client." The record shows ample grounds for the sound exercise of the court's discretion to grant the defense request for a continuance by setting the matter over to December 8, 2006.

The crux of the second component of Michael's second argument is that the court "appointed the second expert, Dr. Hamon, despite the fact no second expert had *ever* been requested." His tacit premise – that without a request by the prosecutor the court had no authority to do so – finds no support in the statute. None of the cases on which he relies so holds, either. Again, his argument without citation to relevant authority is not persuasive. (See *Williams*, *supra*, 16 Cal.4th at p. 266.)

On January 19, 2007, after appointing both Kremsdorf and Hamon, the court granted the defense motion for the appointment of a third psychologist and appointed Musacco. (§ 1368.) Michael raises no challenge to his appointment. At a court trial on March 26, 2007, the court found Michael competent to stand trial and reinstated criminal proceedings. (§ 1368.) Michael's third argument challenges the insufficiency of the evidence of Kremsdorf's testimony, the court's failure to admit his report into evidence, and the impropriety of Hamon's appointment with reference to the court trial of March 26, 2007. We have already rejected all three of those arguments.

So we turn to Michael's fourth and fifth arguments, which challenge, respectively, the order of witnesses and argument at his court trial. The statute governing the order of proceedings at a mental competence trial requires that defense evidence of mental incompetence precede prosecution evidence of competence and that prosecution argument precede defense argument. (§ 1369, subds. (b), (c), (e).) Here, the order of evidence and argument was the contrary. Prosecution evidence of mental competence preceded defense evidence of mental incompetence and defense argument preceded prosecution argument. The record shows why. At 9:40 a.m. on the day of trial, after informing the court of Kremsdorf's inexplicable absence, Michael's attorney "suggested" that the court "perhaps trail this until 1:30." The prosecutor informed the court that Hamon was present. The court stated that having her testify first "makes sense" since she had already made a "schedule adjustment to be here" and that if the prosecutor could have Musacco testify "in an hour or so" Michael's attorney could have Kremsdorf testify "at 1:30 hopefully." Without objection by either party, all three psychologists testified in that order.

After both parties rested, the court offered Michael's attorney the "first opportunity to argue" since section "1368 proceedings were initiated at the request of the defense and the defense is seeking a finding of limited competency." Without objection by either party, he argued first, and the prosecutor argued last. At the end of the

prosecutor's argument, the court asked Michael's attorney if he wished to respond. "Your Honor, without specific inquiry, I think I've stated my position," he replied.

A reviewing court generally will not consider procedural defects in connection with a claim for relief "where an objection could have been, but was not, presented to the lower court by some appropriate method." (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Even "'a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (*Nguyen v. U.S.* (2003) 539 U.S. 69, 88-89.) Michael forfeited his right to appellate review of his fourth and fifth arguments.

For his sixth and final argument, Michael argues that reversal of the judgment is imperative since prejudicial error arose from the cumulative impact of the individual errors at his mental competence trial. He fails to persuade us that any error occurred, so his cumulative error argument is meritless. (*People v. Heard* (2003) 31 Cal.4th 946, 982.)

DISPOSITION

The judgment is affirmed.

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Gomes, Acting P.J.

WE CONCUR:

_____
Dawson, J.

_____
Hill, J.